STATE OF MICHIGAN

COURT OF APPEALS

STANISLAW WOZNIAK and JANINE WOZNIAK, Plaintiffs-Appellants, v VENTURE INDUSTRIES, INC., Defendant-Appellee, and MIKE FLOWERS, d/b/a TRI-STATE LAWN CARE, Defendant.	UNPUBLISHED May 31, 2007 No. 274026 Hillsdale Circuit Court LC No. 05-000458-NO

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs Stanislaw and Janine Wozniak appeal as of right, challenging the trial court's order granting summary disposition to defendant Venture Industries, Inc., pursuant to MCR 2.116(C)(10).[1] We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a truck driver, delivered materials to defendant's Hillsdale facility.[2] Plaintiff used an entrance labeled "Shipping and Receiving" to gain entry to defendant's office in order to process paperwork related to the delivery. Plaintiff made two trips into the office, the first when

[1] The trial court also granted summary disposition in favor of defendant Mike Flowers, d/b/a Tri-State Lawn Care, but plaintiffs do not challenge the dismissal of this defendant.

[2] Because Janine Wozniak's claims are entirely derivative of Stanislaw Wozniak's claims, and because defendant Mike Flowers is not a party to this appeal, we use the singular term "plaintiff" to refer to Stanislaw Wozniak, and the singular term "defendant" to refer to Venture Industries, Inc.

he arrived, and the second just before he left. He observed that the steps leading to the entrance were icy the first time he entered, but used the same entrance for his second trip to the office. He was injured when he slipped on the steps as he left.

Plaintiffs brought this action against defendants, alleging that the icy condition of the steps was unreasonably dangerous. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the icy condition was open and obvious. Defendant also asserted that there was an alternative entrance into the building, and that plaintiff could have learned about it if he made an inquiry before entering the office the second time. The trial court granted defendant's motion, commenting that there were alternatives available to plaintiff.

This Court reviews a trial court's summary disposition decision de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed, supra*. The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact. *Id.*

In a premises liability action, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the possessor of land is generally not required to protect an invitee from open and obvious dangers. *Id.* at 517; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612-613; 537 NW2d 185 (1995). A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Kennedy v Great Atlantic & Pacific Tea Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 272453, 2007), slip op at 2, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517.

In *Lugo*, the Supreme Court stated:

> [W]e conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

The Court explained, by way of example, that such "special aspect" would be present in a commercial building where there was only one exit for the general public, and the floor in front of that exit was covered with standing water. The Court explained that a customer wishing to exit the store would have to cross the wet floor, thus the "open and obvious condition is effectively unavoidable." *Id.* at 518. In contrast, in *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002), this Court held that the hazard of icy steps was not unavoidable because the plaintiff acknowledged that there was an alternative route nearby.

Here, plaintiff does not dispute that the icy condition of the steps was open and obvious, but argues that he could not have avoided using the steps because the shipping office entrance was the only available entrance into the building. However, defendant introduced evidence that another entrance was available to plaintiff, and that plaintiff failed to inquire about alternative entrances, despite ample time to do so. Although plaintiff established that the shipping and receiving entrance was the entrance customarily used by truck drivers making delivery, he did not establish that alternative entrances were unavailable, or that he was somehow prohibited from using an alternative entrance. And the party opposing a motion for summary disposition (in this case plaintiff) is required by MCR 2.116(G)(4) to "set forth specific facts showing that there is a genuine issue for trial" with regard to the issues raised in the summary disposition motion. See *Lugo, supra* at 520. Because plaintiffs failed to establish a question of fact regarding the absence of alternatives to using the icy steps, the trial court did not err in granting summary disposition in defendant's favor.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff